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UNCLAS SECTION 01 OF 03 PRETORIA 000937

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SUBJECT: AMCHAM COMMENTS ON CODES OF GOOD PRACTICE

REFTEL: A) PRETORIA 922

B) PRETORIA 425

C) 04 PRETORIA 5063

(U) This cable is sensitive but unclassified. Not for Internet distribution.

1. (SBU) SUMMARY. The American Chamber of Commerce in South Africa (AmCham) submitted comments to the Department of Trade and Industry (DTI) this week on three draft Codes of Good Practice released by Minister of Trade and Industry Mandisi Mphahlela in December 2004. AmCham's comments focus on corporate practices and requirements that preclude the sale of equity as envisioned in BEE charters, transparency in the creation and implementation of the BEE Advisory Council, and minimizing the risks inherent in the rating process. In addition, AmCham's submission includes questions surrounding the scoring process and calls for greater clarification on a number of smaller issues. The deadline for public comments is March 7. Another seven codes will be released later this year. END SUMMARY.

BACKGROUND ON THE CODES OF GOOD PRACTICE

2. (U) Released in accordance with the Broad-Based BEE (BBBEE) Act of 2003, the Codes of Good Practice explain and clarify issues pertaining to the various black economic empowerment (BEE) scorecard components and consist of one or more "statements." A "statement" is a key principle guiding the implementation of a particular BEE issue. The three Codes released in December provide guidelines on the BEE Framework (Code 000) as well as the equity ownership (Code 100) and management (Code 200) components of BEE.

CODE 000 - BEE FRAMEWORK

3. (SBU) Statement 000, titled "Principles and Definition of Broad-based Black Economic Empowerment," introduced DTI's new generic scorecard with targets. Paragraphs 46-55 provide in-depth descriptions of the seven scorecard elements.

AMCHAM RESPONSE: AmCham's argues that language in this statement could be interpreted in such a way that exempts organs of state and public entities from complying with the Codes. AmCham calls for a maximum skills development target of 3 percent of payroll, which should include the existing 1 percent skills development levy. In the area of enterprise development, AmCham calls for emphasis on mentorship and training rather than just direct investment. AmCham also raised concerns with language in the ICT Charter that may prevent foreign-owned firms from accumulating bonus points or achieving minimum scores.

4. (SBU) Statement 10, titled "Sector Transformation Charters," distinguishes between charters published as "Transformation Charters" versus "Codes of Good Practice." In accordance with section 12 of the BBBEE Act, the Minister must publish a charter as a "Transformation Charter," if it was developed by major stakeholders in that sector and advances the objectives of the BBBEE Act. In addition, if requested by the sector, the Minister may also publish the charter as a "Code of Good Practice" if it meets the above criteria AND complies with all the principles and requirements in the Codes of Good Practice. The differences in the practical effects of these two documents on businesses are significant. Firms belonging to an industry with just a "Transformation Charter" will have their BEE compliance measured against DTI's generic scorecard. Firms belonging to an industry with a charter published as a "Code of Good Practice" will have their BEE compliance measured against that industry's charter scorecard.

AMCHAM RESPONSE: AmCham calls for clarification of

terminology in this statement. In addition, AmCham argues that the views of all stakeholders must be taken into account and reconciled before the industry charter is published by the Minister. This statement makes a distinction between "consultation" with stakeholders and "engagement." "Consultation" is merely a process where relevant stakeholders are interacted with and informed. "Engagement" involves a "substantive and intense involvement in the formulating and drafting of the transformation charter's principles and measurement criteria."

15. (SBU) Statement 20, titled "BEE Advisory Council," outlines the qualification criteria, selection process and disqualification criteria for those serving on the BEE Advisory Council. This is the national advisory body envisioned in sections 4-8 of the BBBEE Act.

AMCHAM RESPONSE: AmCham calls for clarification of terminology and proposes that council members be representative of industry and that rules of procedure for the council be published in the Codes. AmCham asks that invitations for nominations to the council be sent to all industry associations and major stakeholders.

16. (SBU) Statement 30, titled "Qualification, Measurement and Reporting Criteria for Broad-based BEE," identifies policy instruments assisting in the implementation of BEE and distinguishes between narrow-based and broad-based BEE evaluation. Narrow-based BEE evaluation relates to the use of enterprise definitions (i.e., "black owned company," "black empowered company," etc.) in accrediting suppliers for the purpose of procurement. Broad-based BEE evaluation accredits suppliers based on their overall performance against a BEE scorecard.

AMCHAM RESPONSE: AmCham calls for all organs of state and public entities to be held accountable to these criteria.

17. (U) Statement 40, titled "Glossary," contains all terms and definitions used throughout the Codes of Good Practice.

AMCHAM RESPONSE: AmCham calls for clarification of terminology.

18. (SBU) Statement 50, titled "Accreditation of BEE Rating Agencies," relates to the recognition and accreditation of BEE Rating Agencies.

AMCHAM RESPONSE: This is a major issue to AmCham members. Due to confidentiality concerns and potential conflicts of interest, AmCham proposes that the existing auditing industry fill the role of rating agencies. AmCham argues that the auditing profession is already highly regulated and has well-established quality control procedures that lower the risk of incorrect assessments.

CODE 100 - EQUITY OWNERSHIP

19. (SBU) Statement 100, titled "The Role of Equity Ownership in Broad-based Economic Empowerment," deals largely with how to measure black ownership. Twenty-five percent of the issued share capital of a company must be owned by "black" people (Blacks, Coloreds, and Indians who are South African citizens). Ownership is measured by three separate criteria: voting rights, economic interest, and non-encumbrance. The targets for all three criteria are at least 25 percent. A separate statement on multinational ownership issues will be released later in 2005.

AMCHAM RESPONSE: AmCham argues that multinational companies have difficulty selling equity for a variety of reasons: global structure and policy, costs, legal restrictions, governance issues, and other risks. AmCham argues that companies should be allowed not to sell equity if they compensate through over-performance in other areas of the scorecard. AmCham acknowledges that some multinationals have sold equity in countries such as India and China, but says the circumstances are not comparable with S.A. because the size of their markets can justify the cost of accommodating a local partner.

CODE 200 - MANAGEMENT

110. (SBU) Statement 200, titled "Recognition and Measurement of Management," deals with measuring the number of black people that manage and control the company.

AMCHAM RESPONSE: AmCham points out that many foreign-owned companies do not have local boards of directors and the emphasis should accordingly be on the executive management of the firm. AmCham also believes that targets for youth and disabled are impractical and that gender targets should be realistic and reflect the dynamics of each industry.

11. (U) Post is sending the complete text of AmCham's submission to AF/S.

FRAZER